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Supreme Court, U.S.
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NO.

in the

Supreme Court

of the

United States

OCTOBER TERM, 1986

CAROL AMEND,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

I.

WHETHER THE DISTRICT COURT'S CONTINUAL DISPLAY OF PARTIALITY TOWARDS THE GOVERNMENT, IMPROPER INSTRUCTIONS TO THE JURY, ATTEMPT TO PRECLUDE PETITIONER'S COUNSEL FROM PARTICIPATING IN THE DECISION ON DISMISSAL OF A SITTING TRIAL JUROR, AND IMPROMPTU INSTRUCTION TO JURY THAT ITS DECISION WAS REVIEWABLE, WERE VIOLATIVE OF PETITIONER'S RIGHT TO A FAIR AND IMPARTIAL TRIAL, DUE PROCESS OF LAW AND ACCESS TO COUNSEL AS GUARANTEED UNDER THE FIFTH AND SIXTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

II.

WHETHER THE ADMISSION OF EVIDENCE OF UNCHARGED CRIMES AND PRIOR CONVICTIONS IRRELEVANT TO THE PROCEEDING WERE VIOLATIVE OF PETITIONER'S RIGHT TO A FAIR AND IMPARTIAL TRIAL AS GUARANTEED BY THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

PARTIES BELOW

The parties to the proceeding in the United States Court of Appeals for the Fourth Circuit, the Court whose judgment is sought to be reviewed, are the parties before this Court.

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OPINION BELOW

The Opinion of the Court of Appeals is reported at 791 F.2d 1120 (4th Cir. 1986). It is reproduced in the Appendix to the Petition at App. 1-18.

JURISDICTION

The judgment sought to be reviewed by Writ of Certiorari was dated and entered April 22, 1986. Rehearing and Rehearing *en banc* were denied by Order of the Fourth Circuit issued and filed May 30, 1986. The statutory provision which confers on this Court jurisdiction to review the judgment in question by Writ of Certiorari is 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

Petitioner, Carol Amend, was charged in a nine-count Indictment which arose out of her alleged involvement in several marijuana importation schemes. Most, if not all, of the details of each scheme are irrelevant to the issues currently before the Court.[1] However, several specific instances of error by the District Court as to evidentiary matters, jury instructions, and judicial bias warrant review by the Court.

Certain evidence, presented by the Government over objection by Petitioner, was admitted by the District Court without regard to the prejudicial nature of the evidence. The Government's presentation of evidence on the charges contained in the Indictment was directed toward proving a Continuing Criminal Enterprise (CCE) as set forth in Title 21, U.S.C. §848. At the commencement of the trial, the Government's *first* witness, Assistant United States Attorney for the Southern District of Mississippi, James Tucker, was permitted to testify as to Petitioner's prior *conviction* in Mississippi on Federal drug charges. Against the backdrop of this tactical maneuver by the Government and the prejudicial implications involved, the Government also presented evidence, through William Wolf of the Internal Revenue Service, of Petitioner's failure to file tax returns for various years. Failure to file tax returns was *not* charged in the Indictment, however, over objection by Petitioner, the District court permitted the introduction of Wolf's testimony (as well

[1]The factual details of Petitioner's alleged offenses are set forth in full in the Opinion of the Fourth Circuit. (See App. 1-18).

as certified Government documents to that effect). Although this evidence may have had some relevancy to the Government's case in proving a series of violations, the Government had sufficient other evidence relating to Counts 3 through 8 to establish predicate offenses to the Continuing Criminal Enterprise. Petitioner objected to the prejudicial nature of this evidence and its lack of probative value.

Before opening statement and after closing arguments, the District Court informed the jury that its decision could be "corrected by a very fine appellate court that sits above me," as well as by the United States Supreme Court.

Throughout the trial, there were several instances of District Court "favoritism". Included were statements to the jury which insinuated that the District Court "vouched" for the credibility of sixteen co-conspirators whose plea bargains the District Court had approved; the District Court's statement to Petitioner's counsel that there was "overwhelming evidence of guilt"; and finally the exclusion of Petitioner's counsel by the District Court during the dismissal of a juror who was having "marital" problems. With each objection to the above came a corresponding denial by the District Court.

Petitioner was eventually convicted on all counts against her, and was sentenced to serve a mandatory thirty-year prison term, without eligibility for parole, and fined the sum of One Hundred Thousand Dollars ($100,000.00). In the Fourth Circuit Court of Appeals the Petitioner assigned as error the above enumerated issues. The Fourth Circuit, without explanation, rejected Petitioner's claims as being "ridiculous" and "pointless".

REASONS FOR GRANTING THE WRIT[2]

I.

THE DISTRICT COURT'S IMPROPER CONDUCT, PARTIALITY AND INSTRUCTIONS VIOLATED PETITIONER'S RIGHTS TO DUE PROCESS, A FAIR AND IMPARTIAL TRIAL, AND ACCESS TO COUNSEL AS GUARANTEED BY THE FIFTH AND SIXTH AMENDMENTS TO THE CONSTITUTION

Twice the District Court felt the necessity to instruct the jury as to the inner workings of the American judicial system. The first such instance occurred after jury selection and just before opening statements. The District Court stated:

> Now this is a criminal case, and this court is a trial court. We try the cases at this level. This is known as the United States District Court. *Immediately above this court, sitting in Richmond, Virginia,* is what we call the intermediate appellate court, which is the 4th Circuit Court of Appeals. . . . *That looks over the shoulder of this court, and it is the court to which a first appeal from a conviction or a trial in this Court would go.*

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[2]The Fourth Circuit failed to specifically address Petitioner's arguments set forth herein. Therefore, it is necessary that Petitioner specify for this Court each error.

> *And then beyond that, we have the United States Supreme Court,* which is the highest court in the appellate system, and the highest court in the United States. [Emphasis added].
>
> (Tr.X.31-33; App. 21-22)

The District Court compounded the error when it stated after closing arguments:

> Of course, the court reporter takes down every word that I say, and *if I should give you a wrong or an erroneous principal of law, there's a very fine appellate court that sits above me in Richmond that would correct my mistake in this case, as it has corrected my mistakes in the past.* So, do not be concerned about any principle that I give you as to whether or not it states a correct principle of law. [Emphasis added].
>
> (Tr. XVI.3-4; App. 22)

In *Caldwell v. Mississippi*, ____ U.S. ____, 105 S.Ct. 2633 (1985), this Court recently held it was constitutionally impermissible to rest a death sentence on a determination made by a jury which had been informed by the *prosecutor* that its decision was reviewable. It is improper to lead a jury to believe that the ultimate responsibility for determining the appropriateness of the defendant's death rested elsewhere. This Court stated:

> The *uncorrected* suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role . . . (g)iven that a sentence will be subject to appellate review only if the jury returns a sentence of death, the chance that an invitation to rely on that review will generate a bias toward returning a death sentence is simply too great. [Emphasis added].
>
> *Caldwell*, 105 S.Ct. at 2642.

Since the jury in this case was told by the District Court that its decision was reviewable, no doubt it incorrectly perceived its role as *preliminary* rather than final.[3]

The impropriety of the District Court's statements warrants this Court's attention. When a jury's sense of responsibility has been diminished, the system has failed. Our democratic society and the judicial system which oversees it requires a determination be made by an

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[3]The jury was certainly misled as to its role since it was the District Judge *himself* who made the comment, as opposed to the prosecutor in *Caldwell*. The Fifth Circuit has aptly commented on the position the trial judge assumes in the eyes of the jurors:

> The judge is a figure of overpowering influence, whose every change in facial expression is noted, and whose every word is received attentively and acted upon with alacrity and without question. *Travelers Insurance Co. v. Ryan*, 416 F.2d 362, 364 (5th Cir. 1969).

impartial jury. This impingement of the jury's role was a violation of the Fifth and Sixth Amendments to the Constitution.

Several times during the course of the trial the District court conducted itself in a manner which appeared to be in disregard for the rights of the Petitioner. At one point, the District Court vouched for the credibility of co-conspirators who had become Government witnesses, by stating to the jury that it had approved the plea bargains entered into by these witnesses. Sixteen alleged co-conspirators were called by the Government. (App. 22-23). Thus, the District Court enhanced the Government's case by implying that these witnesses were testifying truthfully.

On another occasion, the District Court commented that the evidence against Petitioner was "overwhelming". (App. 23-25). While this Court has approved the practice by a trial judge of commenting on the evidence, the "trial judge [is] to use great care that an expression of opinion upon the evidence should be so given as not to mislead and especially should not be one-sided." *Quercia v. United States*, 289 U.S. 446, 470, 53 S.Ct. 698, 699 (1933). More disturbing is the fact that the judge's comments were made during the *first* witness' testimony and before Petitioner had any opportunity to cross-examine. Whether the District Court violated its duty of open-mindedness and impartiality is worthy of this Court's consideration.

The final, and probably most blatant violation of Petitioner's Fifth and Sixth Amendment rights occurred while the District Court was making a decision in response

to a juror's request to be excused. The District Court curtly informed Petitioner's counsel, who could not hear the court's questions to the juror, that counsel's participation was unnecessary. The court stated: "Well, I don't know that it's necessary for you to hear this." (Tr.XIII.2-8; App. 25-33). The juror was excused without Petitioner's counsel being afforded an opportunity to sufficiently object. With one fell swoop, Petitioner was denied access to counsel, a fair and impartial jury and due process of law.

Several instructions by the District Court were improper and indicative of the court's apparent favoritism towards the Government. During his final charge to the jury, the District Court instructed the jury as to the inferences which could be drawn from the quantity of the evidence presented by each side.[4] The District Court stated:

> The weight of the evidence is not necessarily determined by counting the number of witnesses testifying on either side. You should consider all the facts and circumstances in evidence to determine which witnesses are worthy of credence and belief. You may find that the testimony of a similar number of witnesses *on one side* is more credible than the testimony of a greater number of witnesses *on the other side.* [Emphasis added].
>
> (Tr. XVI. 10-11; App. 34).

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[4]Petitioner inadvertently requested this instruction. When pointed out to the court, the District Judge stated he made the instruction with "tongue-in-cheek" and that although he gave it he "just didn't like the charge." (App. 33-34).

Petitioner did not testify at her trial, nor did she call any witnesses. Incredibly, the District Court agreed that the instruction was improper but, nonetheless, refused to correct the error. Surely, with such an instruction the jury could only draw an inference of guilt.

Petitioner also directs this Court's attention to the District Court's final instructions to the jury. Without either warning or notice,[5] the court instructed the jury:

> . . . Now I mentioned to you on more than one occasion, and *I just mention it now for emphasis*, you must remember that *these attorneys are advocates, they're partisans, they're trying to convince you that their side of the case should prevail.* But under your oath and under my oath, we're not permitted to be partisan in any manner. We spent a great deal of time selecting you as a disinterested, fair-minded, unbiased, unprejudiced jury, and I'm confident as I've ever been of anything that this jury will arrive at a fair and just verdict, a verdict that does justice to the parties here. [Emphsis added].

(Tr. XV.181-182; App. 35).

It was apparent that the instruction was made with defense counsel in mind. There was only one defendant in the courtroom during the trial and that was Petitioner. Thus, it was clear that the "partisan"

[5]By failing to advise counsel in advance of his intention to give such an instruction, the District Court violated F.R.Crim.P. 30. By failing to inform counsel prior to giving the instruction, the Court violated Petitioner's right to effective assistance of counsel.

was Petitioner's defense counsel. In effect, the court's instruction emasculated the effectiveness of Petitioner's counsel's arguments while unfairly promoting the Government's case.

Since the ultimate responsibility for fair instructions remains exclusively within the province of the judge, he must exercise special care to protect the defendant's rights. *United States ex rel. Smith v. Pavich*, 568 F.2d 33 (7th Cir. 1978). As this Court has aptly observed in *Chapman v. California*, 368 U.S. 18, 23, 87 S.Ct. 824, 827 (1967), "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless." Surely, the giving of *proper* instructions is one of those "basic" constitutional rights.

Sub judice, many infractions occurred as the District Court failed to exercise special care to protect Petitioner's rights. It is apparent that the cumulative effect of the erroneous instructions, the District Court's partiality towards the Government and its adverse rulings against Petitioner were devastating and resulted, Petitioner submits, in her being unfairly convicted. Petitioner was systematically stripped of her Fifth and Sixth Amendment rights. This Court's review is necessary to ensure that Petitioner's rights are fully restored in light of the District Court's departure from the accepted and usual course of judicial proceedings.

II.

THE ADMISSION OF "UNCHARGED CRIMES" AND PRIOR CONVICTION EVIDENCE PURPORTEDLY TO PROVE PREDICATE OFFENSES OF A CONTINUING CRIMINAL ENTERPRISE VIOLATED THE FAIR AND IMPARTIAL TRIAL GUARANTEES OF THE SIXTH AMENDMENT TO THE CONSTITUTION

Two specific evidentiary rulings by the District Court in and of themselves prejudicial to Petitioner, require review by this Court. First, the District Court permitted the introduction of testimony and evidence from the Government's very *first* witness which established that Petitioner had two prior serious Federal drug convictions. Over objection, the District Court allowed the introduction of this testimony purportedly to prove the Continuing Criminal Enterprise charge. The unnecessary introduction of this "other crimes" evidence, in light of the fact that the Government had sufficient other proof, cast immediate prejudice upon Petitioner.[6]

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[6]In *Garrett v. United States*, _____ U.S. _____, 105 S.Ct. 2411 (1985), this Court allowed evidence *underlying* a prior conviction to be introduced to prove one of three predicate offenses that must be shown to make out a CCE violation. Proof of that defendant's conviction was *not*, however, allowed to be introduced. Thus, evidence of Petitioner's participation in the Mississippi scheme was admissible, however, evidence of Petitioner's *convictions* in Mississippi should not have been admitted. In light of the fact that the first Government witness was called simply to establish the prior convictions, Petitioner's epidermis was immediately and indelibly tattooed in an unfavorable light. Petitioner submits this was in contravention of this Court's ruling in *Garrett*.

It is clear beyond debate that under Fed.R.Evid. 404(b), unless the accused places his/her character in evidence or testifies (neither of which occurred *sub judice*), it is improper for the Government to introduce evidence that the accused is a convicted felon.[7] It is apparent that the Government, at the commencement of the trial, sought to inject in the minds of the jurors Petitioner's "bad character" as a twice-convicted felon. The admission of that testimony is clearly contrary to the mandate of this Court:

> Courts which follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt . . . . The State may not show defendant's prior trouble with the law, specific criminal acts, or ill fame among his neighbors, even though such facts may logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience its

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[7]An exception is when the conviction is an element of the offense, which was not the situation *instanter*. A typical example would be where the defendant is accused of possession of a firearm by a *convicted* felon.

> disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice.
>
> *Michelson v. United States*, 335 U.S. 469, 475-76, 69 S.Ct. 213, 218 (1948).

Fed.R.Evid. 404(b) Advisory Committee Note sheds light on the matter:

> The determination must be made whether the danger of undue prejudice outweighs the probative value of the evidence in view of the availability of other means of proof and other factors appropriate making decisions of this kind under Rule 403.

The Fourth Circuit found that even without the prior conviction, the Government had ample proof of the three violations needed to prove a Continuing Criminal Enterprise.[8] Thus the conviction evidence though apparently important to the Government was unnecessary and, because it was prejudicial, this Court should review Petitioner's convictions. Whether the jury was persuaded by this evidence to convict and whether the introduction of this evidence severely diminished Petitioner's right to receive a fair and impartial trial warrants review by this Court.

Just as the Government strategically sought to prejudice Petitioner at the commencement of the trial, the same was accomplished near the conclusion of the

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[8]The Fourth Circuit applied the harmess error rule without stating it.

trial. Over objection, the Government elicited the testimony from an Internal Revenue Service agent who testified to Petitioner's *failure* to file tax returns for various years. Petitioner submits that there is no connection between the failure to file tax returns and her financial status relative to the crime of Continuing Criminal Enterprise.

The admissibility of "other crimes" evidence rests on several factors:

> One of the accepted bases for the admissibility of evidence of other crimes arises when such evidence 'furnishes part of the context of the crime' 'or is necessary to a "full presentation" of the case,' or is so intimately connected with and explanatory of the crime charged against the defendant and is so much a part of the setting of the case and its 'environment' that its proof is appropriate in order 'to complete the story of the crime on trial by proving its immediate context. . .' . [Citations omitted].

United States v. Masters, 622 F.2d 83, 86 (4th Cir. 1980). Based on these criteria, the District Court's admission of the "uncharged crime" evidence was erroneous.

In *United States v. Shelton*, 628 F.2d 54 (D.C. Cir. 1980), the District of Columbia Circuit held that evidence of Shelton's financial status was inadmissible because there was no connection between that evidence and the crime charged; that being assault. The Court went on to state that the " 'wild card' introduced by the prosecutor's protrayal of the defendant as a criminal

type did not hold sway—it cannot be said 'that the error did not influence the jury' ". *Shelton*, 628 F.2d at 58, quoting *Kotteakos v. United States*, 328 U.S. 750, 764, 66 S.Ct. 1239, 1247 (1946). *Sub judice*, the admission of Petitioner's failure to file tax returns was irrelevant to prove a Continuing Criminal Enterprise. Nor was the evidence necessary "to complete the story of the crime".[9]

It is apparent that the Fourth Circuit, by approving the District Court's ruling on the admissibility of this evidence, has violated the basic premise of Fed.R.Evid. 403 "to exclude matters of scant or cumulative probative force." *United States v. McRae*, 593 F.2d 700, 707 (5th Cir. 1979) *cert. den.* 444 U.S. 862 (1979). It is reasonable to conclude that the evidence of Petitioner's prior Federal drug convictions and failure to file tax returns might well have contributed to Petitioner's conviction. Review by this Court will establish the standard under which "other" and "uncharged" crimes evidence should properly be admitted.

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[9]In *United States v. Barnes*, 604 F.2d 121, 147 (2d Cir. 1979), the Second Circuit allowed the introduction of tax returns to prove that "substantial income or resources" were obtained from an enterprise, an element of the offense of conducting a Continuing Criminal Enterprise. The *absence* of the filing of returns, which the Government introduced at Petitioner's trial, cannot be said to prove this element of the offense.

CONCLUSION

The Petitioner has been denied basic fundamental rights guaranteed by the United States Constitution. She seeks relief in this Court to restore those rights. Based on the arguments and authorities cited herein, Petitioner, CAROL AMEND, respectfully requests this Honorable Court to grant a Petition for Writ of Certiorari to the Fourth Circuit Court of Appeal, reversing that Court's decision.

Respectfully submitted,

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Appendix

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 84-5356 (L)

UNITED STATES OF AMERICA,
Appellee,

versus

CAROL AMEND,
Appellant,

No 84-5357

UNITED STATES OF AMERICA,
Appellee,

versus

CAROL AMEND,
Appellant.

Appeal from the United States District Court for the District of South Carolina, at Columbia. Charles E. Simons, Jr., Chief District Judge. (CR-84-130).

Argued: December 5, 1985 Decided: April 22, 1986

Before SPROUSE and ERVIN, Circuit Judges, and MOTZ, United States District Judge for the District of Maryland, sitting by designation.

Joel Hirschhorn (Rhea P. Grossman; Jack B. Swerling on brief) for Appellant; John McIntosh, Assistant United

States Attorney, and Robert C. Jendron, Jr., Assistant United States Attorney (Vinton D. Lide, United States Attorney on brief) for Appellee.

SPROUSE, Circuit Judge:

Carol Amend appeals from her conviction on all counts of a nine-count indictment which charged her, *inter alia*, with engaging in a continuing criminal enterprise (CCE) in violation of 21 U.S.C. §848.[1] The district court sentenced her on the CCE count only to a prison sentence of thirty years without possibility of parole and a fine of $100,000, and ordered her to forfeit all assets and profits gained through her illicit enterprise. We affirm her conviction and sentence and affirm in part and vacate in part the forfeiture judgment.

I.

The testimony at Amend's trial established her involvement in at least five marijuana smuggling offenses between 1975 and 1980.

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[1]The Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, tit. II, §§ 303, 305, 98 Stat. 2044, 2050, amended 21 U.S.C. §848, effective October 12, 1984, several days prior to Amend's trial. The changes do not affect disposition of Amend's appeal, and, therefore, we need not determine the application of the 1984 amendments to Amend's conviction.

The jury also convicted her of conspiracy to import marijuana, conspiracy to distribute and six substantive importation and distribution offenses in violation of 21 U.S.C. §§ 963, 846, 960(a)(1), and 841(a)(1) and of 18 U.S.C. §2.

The Mississippi Conviction

James Tucker, Assistant United States Attorney for the Southern District of Mississippi, testified that Amend was convicted of conspiracy to import marijuana and conspiracy to possess marijuana in federal court in the Southern District of Mississippi in 1976. Her convictions resulted from her involvement in the importation of 40,000 pounds of marijuana in 1975.

The "Venganza" Scheme

In 1978, Amend hired Rocky Bradford to captain the "Venganza" in a venture to smuggle 7,500 pounds of marijuana into Barnegat Bay, New Jersey. Bradford flew to St. Martin to meet with Amend and Jerry Kilpatrick, one of Amend's associates, to finalize arrangements for the venture. At this meeting, Amend told Bradford that Gustavus Diaz would be the source of the marijuana in South America. Bradford also testified that Amend had indicated very clearly that Kilpatrick worked for her. Two days before the boat was to leave for South America, Bradford and his two crew members met with Amend and Kilpatrick in St. Thomas, where the group discussed the pick-up and unloading sites. Bradford sailed to South America, where he met Kilpatrick and loaded approximately 7,500 pounds of marijuana onto the "Venganza." Bradford then returned on the "Venganza" to St. Martin, where he met with Amend and Kilpatrick. Amend and the others removed a bale of the marijuana from the ship to test its quality. They also discussed the plan to transport the marijuana to Barneget Bay, New Jersey where, as Amend informed Bradford, Fred Fillingham, a close associate of Amend, was to be the contact.

Bradford sailed the "Venganza" to Barneget Bay where he met Fillingham and transferred the marijuana to the "Adrienne," a vessel which Fillingham had provided for transport to shore. The smugglers then trucked the marijuana to a house which Fillingham had rented. The marijuana was later moved to a house which Amend and Kilpatrick had leased. Bradford and a crew member testified that they saw Amend on Fillingham's boat, although another crew member testified that he had not seen her. Several witnesses testified about the period in which the marijuana was kept in the second "stash" house. Amend was present at various times, and Patrice Bradford testified that Amend "acted as if [the marijuana] was hers." John Black testified that Amend told him she owned the "Venganza." He also testified that after the successful completion of the New Jersey venture, she told him that she would give the offloaders a $3,000 bonus for staying for a longer period than they had originally planned. Other witnesses' testimony concerned large amounts of money which traded hands and was counted and stored at the house. Bradford testified that he counted $2 million being kept in Amend's bedroom during this period.

The Violations Relating to the "Serena" and "Scandal" Offloads

In May 1979, Amend was looking for offloading sites near Charleston, South Carolina. By this time, Bradford had formed his own independent "offload business." Amend hired him to provide his services for a single 25,000 pound shipment into South Carolina to occur in June. Enno Brouwer testified that Amend had instructed him to go to Dominica to await instructions. In Dominica, she directed him to meet the mother ship, "The Golden Promise," which Fillingham owned. Amend

paid Fillingham $140,000 for the use of the vessel. Fillingham testified that he picked up the marijuana in Columbia and took it to Dominica, where he met Amend and Kilpatrick. The marijuana was then distributed among four sailboats. Amend hired two crew members for one of the vessels and with Kilpatrick obtained Dennis Drum's services to take the "Venganza" to Tortola. Kilpatrick subsequently directed Drum to move the boat to Dominica. Fillingham testified that he and Amend owned two of the boats, the "Venganza" and the "Scandal."

Kilpatrick informed Bradford that the marijuana would arrive at Port Royal Sound, South Carolina on three boats instead of on one as originally planned.[2] Bradford told Kilpatrick that his fee would be $1 million for this riskier plan. Kilpatrick replied that he would have to check with Amend. Kilpatrick later agreed to the new terms.

The "Scandal," carrying 7,000 pounds of marijuana, arrived on June 3, 1979. The second, the "Serena," carrying 7,500 pounds, arrived on June 12, 1979. Amend, however, was not present at Port Royal Sound for the arrival or unloading of either boat. The third sailboat, the "Venganza," sank off the Georgia coast. Immediately after the sinking, Kilpatrick, Bradford and another man went to Georgia to find out what had happened. One of the crewman of the "Venganza" testified that he was hired by and received instructions from Amend and Kilpatrick. An attorney, Mark Singer, testified that Kilpatrick contacted him to represent the crew arrested from the "Venganza."

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[2]The fourth sailboat apparently sailed to Canada.

The "Super Bowl Sunday" Scheme

Bradford was again hired as a contract offloader for a shipment of approximately 20,000 to 22,000 pounds of marijuana due to come into South Carolina on Sunday, January 20, 1980.[3] Bradford sent his wife, Patrice, to St. Barts, where she met Amend and Fillingham. Patrice and Amend then went to Aruba, where Patrice acted as an interpreter between Amend and Gustavos Diaz. Bradford later sent John Black to Guadeloupe, where Amend instructed him to deliver the coordinates of the offload site to the captain of the "Dutch Treat," which would carry the shipment to South Carolina.

Prior to the shipment, Bradford arranged accommodations for Amend and Tony Locke on Seabrook Island. Allen Patterson, a contract "offloader," testified that Locke acted "in the same capacity that Jerry Kilpatrick had, he was going to be there at the unload and help and supervise and generally make sure we didn't steal any of the marijuana." He also testified that when a Coast Guard ship almost discovered the "Dutch Treat," Amend excitedly remarked, " 'You got to do something, that's my boat and my crew and my load, what are you going to do?' " Another participant testified that Amend owned the marijuana and directed activities in general. The "Dutch Treat" safely unloaded approximately 22,000 pounds of marijuana on January 20, 1980.

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[3]This venture coincided with the National Football League's "Super Bowl Sunday." Both the appellant and the government use the Super Bowl reference to designate this particular smuggling venture.

II.

In a multi-pronged attack on her conviction, Amend assigns as error the sufficiency and constitutionality of the continuing criminal enterprise count of the indictment, the denial of a bill of particulars, a motion to exclude evidence of the Mississippi conviction and a motion for acquittal, and the charge to the jury. She attacks the indictment as insufficient to allow forfeiture, the evidence as insufficient to establish the government's right to forfeiture, and the court's instructions and jury form on forfeiture as reversible error. She contends that the forfeiture order and post-judgment procedures violated her due process rights, and that she was denied a fair trial as a result of judicial bias and improper evidentiary rulings.

Some of Amend's contentions concerning the forfeiture proceedings are meritorious, and we shall consider them, *infra*, in greater detail. Most of her "shotgun" approach on appeal, however, is without substantial merit. First, she contends that the indictment was insufficient to charge her with a continuing criminal enterprise violation because it does not allege the elements of the crime, principally the names of the five individuals with whom she acted in concert. Alternatively, she asserts that the district court should have granted a bill of particulars setting forth this information. It has been consistently held that it is sufficient in a continuing criminal enterprise charge if the indictment tracks the statute. *United States v. Lurz*, 666 F.2d 69, 78 (4th Cir. 1981), *cert. denied*, 455 U.S. 1005 (1982); *United States v. Sperling*, 506 F.2d 1323, 1344 (2d Cir. 1974), *cert. denied*, 420 U.S. 962 (1975). Count Nine of Amend's indictment in this case charged that Amend:

did engage in a Continuing Criminal Enterprise in that she did violate Title 21, United States Code, Sections 841(a) (1), 846, 952, 960, and 963, which violations were part of a continuing series of violations of said statutes undertaken by said defendant in connection with at least five other persons, with respect to whom the defendant occupied a position of organizer, supervisor, or manager, and from which continuing series of violations the defendant obtained substantial income and resources . . .

This count clearly tracks the language of the statute.[4] Moreover, the government maintained an "open file" policy in this case and all information identifying the alleged participants was available to Amend and her

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[4]21 U.S.C. §848(b) states:

For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if—

(1) he violated any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter—

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

counsel. Her counsel admits that prior to trial he obtained all necessary information from the government's files. Amend, therefore, suffered no prejudice from any alleged lack of specificity in this regard or from the denial of the bill of particulars.

In this same vein, Amend also alleges that the portion of the indictment relating to forfeiture was not sufficiently specific. The indictment charged that she obtained substantial income and resources from the continuing series of violations and that the United States was entitled to them by forfeiture. This language was sufficient to apprise Amend that she could be deprived of any interest in property acquired from drug-related profits. She asserts, however, that the indictment was insufficient to meet the specificity requirements of Rule 7(c)(2) of the Federal Rules of Criminal Procedure regarding the extent of interests or property subject to forfeiture. Her contention lacks merit with respect to the three assets which the jury specifically determined were forfeitable, the vessels, the "Dutch Treat" and the "Scandal," and real property in the form of "Renegade Ranch." We discuss, infra, the defects in the forfeiture of other assets. With respect to the forfeiture of the vessels and the ranch, we find that the government complied with Rule 7(c)(2), the essential purpose of which is to provide persons with adequate notice of the extent to which forfeiture is sought. *United States v. Grammatikos*, 633 F.2d 1013, 1024-25 (2d Cir. 1980). This court has held that the indictment need not describe each item subject to forfeiture, but that "[t]his can be done in a bill of particulars." *United States v. Raimondo*, 721 F.2d 476, 477 (4th Cir. 1983), *cert. denied*, 105 S.Ct. 133 (1984). Here, the government's "open file" policy provided

Amend with access to all information in the government's possession and with adequate notice of its intention to seek forfeiture. This process gave her adequate notice of the extent to which forfeiture was sought in the same manner as a bill of particulars would have provided, and she suffered no prejudice as a result of the denial of the bill of particulars. Under the narrow circumstances of this case then, any error in denying her motion for a bill of particulars was harmless.

Amend next asserts that the district court erred by allowing the use of evidence of her prior Mississippi conviction as proof of a predicate offense to the continuing criminal enterprises charge and by not granting her motion for judgment of acquittal. Amend maintains that the admissible evidence at trial failed to establish beyond a reasonable doubt that she occupied a position as organizer or supervisor with respect to a continuing series of violations of federal narcotics laws. Amend correctly asserts that a continuing series of violations requires a minimum of three such violations. *United States v. Ricks*, 776 F.2d 455, 463 & n.13 (4th Cir. 1985), *reh'g granted*, 784 F.2d 544 (1986). We find, however, that the evidence at Amend's trial was sufficient to establish her position as a manager or supervisor in at least three violations. In considering an attack on the sufficiency of the evidence underlying a conviction, this court must view the evidence in the light most favorable to the government. *Glasser v. United States*, 315 U.S. 60, 80 (1942); *United States v. Jones*, 735 F.2d 785, 790 (4th Cir.), *cert. denied*, 105 S.Ct. 297 (1984). Her challenge to her CCE conviction on the ground that the Mississippi conviction could not be considered a predicate offense fails because even without the evidence of that conviction, the evidence at trial

was sufficient to prove her involvement in at least three violations, and that she occupied a managerial or supervisorial role with respect to at least five persons. *See United States v. Sinoto*, 723 F.2d 1250, 1261 (6th Cir. 1983), *cert. denied*, 105 S.Ct. 86 (1984) (relationship requirement in a §848 case is flexible; relationship with five other individuals need not exist simultaneously). Specifically, the evidence showed her managerial or supervisory role in: 1) the importation of 7,500 pounds of marijuana into Barnegat Bay, New Jersey in 1978 on the sailboat "Veneganza"; 2) the importation of 7,000 pounds of marijuana into Port Royal Sound, South Carolina on June 3, 1979 on the sailboat "Scandal"; 3) the importation of 7,500 pounds of marijuana on June 12, 1979, on the sailboat "Serena"; and 4) the importation of 22,000 pounds of marijuana in South Carolina on January 20, 1980.

There is likewise no merit to Amend's assertion that the trial court erroneously charged the jury as to the elements of the CCE offense. The court charged:

> There are four elements which the prosecution must prove beyond a reasonable doubt in order to establish the guilt of the defendant as to the offense of continuing enterprise. These elements are, first, that the defendant participated in a continuing series of statutory violations. Two, that such participation was in concert with at least five other persons.
>
> Three, that the position—the—(sic) that the defendant occupied a position as an organizer, or was in a supervisory position, or was in any

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other position of management. That the defendant obtained, and this is the fourth element. That the defendant obtained a substantial income from such enterprise.

Amend assets that the instruction omitted the first element of the offense—that the defendant have committed a felony violation of the federal narcotics law, as part of a continuing series of violations, the second element. This instruction could have indicated more clearly that the government was required to prove that Amend had committed a felonious drug offense as part of a continuing series of violations. *Lurz*, 666 F.2d at 75. Such an instruction would have tracked 21 U.S.C. §848 more closely and stated explicitly that the CCE offense contains five elements. The district court, however, simply combined the first two elements, and we do not think the jury could have been confused by this language which adequately describes all the elements of the crime. In sum, the instruction did not lessen the government's burden of establishing a violation of 21 U.S.C. §848. We also reject Amend's challenge to the district court's refusal to instruct the jury on aiding and abetting as a lesser included offense of the CCE count or to inform the jury as to the penalty for a §848 conviction.

There likewise is no merit to Amend's contention that 21 U.S.C. §848 is unconstitutional either facially or as applied in this case. We do not find Amend's sentence unconstitutional under the Eighth Amendment. *See Solem v. Helm*, 463 U.S. 277, 292 (1983). We also find that she was not denied a fair trial because of asserted

bias on the part of the trial judge[5] and that there were no prejudicial evidentiary rulings by the district court.

Finally, Amend argues that the government failed to offer any evidence that the assets subject to forfeiture were still in existence at the time of her conviction. She relies upon *United States v. Alexander*, 741 F.2d 962 (7th Cir. 1984) and *United States v. McManigal*, 708 F.2d 276 (7th Cir.), *vacated on other grounds*, 464 U.S. 979, *aff'd on remand*, 723 F.2d 580 (7th Cir. 1983). In *United States v. Ginsburg*, 773 F.2d 798, 802 (7th Cir. 1985) (en banc), *cert. denied*, _____U.S._____, 106 S.Ct. 1186, 89 L.Ed.2d 302 (1986) (No. 85-840), the Seventh Circuit, however, overruled the holding of these prior cases that racketeers' profits no longer in existence at time of conviction are not subject to forfeiture.[6]

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[5]Amend raises several specific allegations in an attempt to show judicial bias. Some are ridiculous. For example, she complains that a reference to her lawyer's residence in Miami was evidence of bias. Equally pointless is her attack on the district court's refusal to allow her counsel to hear a portion of the questioning of a juror relating to the juror's marital problem. The court excused the juror because of that problem.

[6]The Seventh Circuit cases involved the Racketeer Influenced and Corrupt Organizations (RICO) chapter of the Organized Crime Control Act of 1970, 18 U.S.C. §1961 *et seq.* The RICO and CCE forfeiture provisions are similar. The Seventh Circuit described the rationale for its holding very ably:

> What the defendant's argument overlooks is the fact that a racketeer who dissipates the profits or proceeds of his racketeering activity on wine, women and song has profited from organized crime to the same extent as if he had put the money in his bank account. Every dollar that the racketeer derives from illicit activities and then spends on such items as food, entertainment,

III.

Having found no merit to most of the allegations of error which Amend has presented to this court, we turn to an aspect of the trial which troubles us and

(Footnote 6 Continued)

> college tuition, and charity, is a dollar that should not have been available for him to spend for those purposes. In order to truly separate the racketeer from his dishonest gains, therefore, the statute requires him to forfeit to the United States the total mount of the proceeds of his racketeering activity, regardless of whether the specific dollars received from that activity are still in his possession.

Ginsburg, 773 F.2d at 802. In the Comprehensive Crime Control Act of 1984, Congress amended the forfeiture provisions relating to both the RICO and CCE statutes. Pub. L. No. 98-473, tit. II, §§ 302, 303, 98 Stat. 2040-51 (1984). A new section setting forth the forfeiture penalty applicable to 21 U.S.C. §848, 21 U.S.C. §853(c), provides that:

> All right, title, and interest in property described in subsection (a) of this section vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (n) of this section that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

Pub. L. No. 98-473, tit. II, 303, 98 Stat. 2045. The *Ginsburg* reasoning is persuasive, and the government need not have offered evidence that the forfeitable assets were still in existence at the time of Amend's conviction.

conclude that the district court committed prejudicial error concerning this one phase of the forfeiture proceedings. The jury, in its special verdict form relating to forfeiture, found that Amend had acquired her ownership interest in one, the vessel "Dutch Treat," two, the vessel "Scandal," and three, certain real estate, "Renegade Ranch", as a result of having engaged in a continuing criminal enterprise. The jury in its fourth forfeiture finding also determined that she had acquired her ownership in

> [A]ll profits obtained arising from Carol Amend's participation in this enterprise and any interest, property and contractual rights of any kind affording a source of influence over this enterprise from engaging in a continuing criminal enterprise, in violation of Title 21, U.S.C. §848, as alleged in Count 9 of the Indictment.

Rule 31(e) of the Federal Rules of Criminal Procedure provides for the procedural implementation of the RICO criminal forfeiture provision, 18 U.S.C. §1963, and the CCE forfeiture provision, 21 U.S.C. §§ 848 and 853, and requires a special verdict.[7] *United States v. Hess*, 691

[7]Fed. R. Crim. P. 31(e) provides:

> If the indictment or the information alleges that an interest or property is subject to criminal forfeiture, a special verdict shall be returned as to the extent of the interest or property subject to forfeiture, if any.

Commentary on the procedural implementation of the special verdict in criminal forfeiture is sparse. For a general discussion of the forfeiture procedures, see Reed, *Criminal Forfeiture Under the Comprehensive Forfeiture Act of 1984: Raising the Stakes*, 22 Am. Crim. L. Rev. 747, 758-60 & n.66, 769-77 (1985); Reed & Gill, *RICO Forfeitures, "Forfeitability Interest" and Procedural Due Process*, 62 N.C.L. Rev. 57, 95 (1983).

F.2d 188, 190 (4th Cir. 1982); Fed. Crim. P. 31(e) advisory committee note; *see also* 3 C. Wright, Federal Practice and Procedure: Criminal 2d §512, at 9-10; Pianin, *Criminal Forfeiture: Attacking the Economic Dimension of Organized Narcotics Trafficking*, 32 Am. U.L. Rev. 227, 236-42 (1982). Forfeiture under the CCE statute "is plainly a criminal matter as opposed to civil matter." *United States. v. Garrett*, 727 F.2d 1003, 1012 (11th Cir. 1984), *aff'd* 105 S.Ct. 2407 (1985). The actions are *in personam*, not *in rem. Id.* (quoting *United States v. Long*, 654 F.2d 911, 914 (3d Cir. 1981)). A defendant is entitled to a jury trial on the issue of whether a particular asset is forfeitable. *Id.*

Following Amend's conviction, the district court instructed the jury that it had to determine whether Amend had acquired her ownership interests in certain specified assets, the two vessels and the ranch, as the result of having engaged in a continuing criminal enterprise. It also instructed the jury that it was to determine if "from engaging in a continuing criminal enterprise in violation of this kingpin [CCE] statute" she had acquired her interest in "all profits obtained, arising from [her] participation in this enterprise." The Special jury verdict reflected these instructions.[8]

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[8]We, the Jury, find that defendant, Carol Amend, has acquired her ownership interests in:

1.	"THE DUTCH TREAT"	Yes X	No ___
2.	"THE SCANDAL"	Yes X	No ___
3.	Lot 10, John E. Junkin Subdivision, also known as Renegade Ranch	Yes X	No ___

After the jury verdict, the district court entered an order of forfeiture and directed Amend to submit to an examination as a judgment debtor and to furnish the government with information pertaining to her property. Based on Amend's testimony, the district court issued two orders of forfeiture relating to a bank account in the Bahamas and to a purebred Arabian horse.

Although we find no reversible error in the procedure by which the jury considered and determined the forfeitablity of the three assets specifically listed in its special verdict, and find the evidence sufficient to support their forfeiture, we vacate the district court's orders forfeiting the property identified in post-judgment proceedings under the authority of part four of the jury's special verdict which included the general catch-all category of assets. This final part of the special verdict is tautologous and provides no basis upon which to forfeit assets under either 21 U.S.C. §848(a)(2) (1982) (repealed 1984) or the newly enacted 21 U.S.C. §853. *See*, supra, notes 1 and 5. By this part of the verdict, the jury found, in effect, that Amend had obtained her profits from and ownership interests in the enterprise as the result of having engaged in the enterprise. This

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(Footnote 8 Continued)

4. All profits obtained arising from Carol Amend's participation in this enterprise and any interest, property and contractual rights of any kind affording a source of influence over this enterprise Yes X No ____

from engaging in a continuing criminal enterprise, in violation of Title 21, U.S.C. §848, as alleged in Count 9 of the Indictment.

catch-all form eviscerates the procedure proscribed for criminal forfeiture in Rule 31(e).

Having determined that this part of the verdict was improper, we do not need to decide the merits of Amend's challenge to the post-trial procedures which the government used to identify the assets in this category, including deposits in the Nassau, Bahamas bank and a purebred Arabian horse. The jury did not determine the forfeitability of the defendant's interest in these assets according to the requirements of Rule 31(e), and their forfeiture is invalid. We affirm the forfeiture of the "Dutch Treat," the "Scandal" and the "Renegrade Ranch."

In view of the above, the judgment of the district court is affirmed in part, and reversed and vacated in part.

AFFIRMED IN PART, REVERSED AND VACATED IN PART.

[FILED MAY 30 1986]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 84-5356

UNITED STATES OF AMERICA,

Appellee,

versus

CAROL AMEND,

Appellant.

No. 84-5357

UNIED STATES OF AMERICA,

Appellee.

versus

CAROL AMEND,

Appellant.

Appeals from the United States District Court for the District of South Carolina, at Columbia. Charles E. Simons, Jr., District Judge

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to

this Court. As no member of the Court requested a poll on the suggestion for hearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Sprouse, with the concurrence of Judge Ervin and Judge Motz, United States District Judge, sitting by designation.

For the Court,

JOHN M. GREACEN

CLERK

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS BELOW

[1-31] THE COURT: NOW, LADIES AND GENTLEMEN, FOR YOUR OWN INFORMATION AND TO PUT YOU IN A BETTER POSITION TO ANSWER THE QUESTIONS WHICH I WILL ASK YOU, I WOULD LIKE TO TELL YOU A LITTLE BIT ABOUT WHAT THIS TRIAL IS ALL ABOUT AND ALSO IDENTIFY FOR YOU THE ATTORNEYS FOR THE PROSECUTION AND THE ATTORNEYS FOR THE DEFENDANT, AS WELL AS IDENTIFYING THE DEFENDANT FOR YOU, BECAUSE YOU WILL BE ASKED QUESTIONS ABOUT YOUR ACQUAINTANCESHIP OR YOUR CONTACT OR YOUR KNOWLEDGE WITH THE ATTORNEYS, OR WHETHER YOU HAVE ANY RELATIONSHIP BY BLOOD OR MARRIAGE WITH ANY OF THEM OR WITH THE DEFENDANT.

NOW THIS IS A CRIMINAL CASE, AND THIS COURT IS A TRIAL COURT. WE TRY THE CASES AT THIS LEVEL. THIS IS KNOWN AS THE UNITED STATES DISTRICT COURT. IMMEDIATELY ABOVE THIS COURT, SITTING IN RICHMOND, VIRGINIA, IS WHAT WE CALL THE INTERMEDIATE APPELLATE COURT, WHICH IS THE 4TH CIRCUIT COURT OF APPEALS.

* * *

[1-33] AS I WAS SAYING, THIS IS A TRIAL COURT, WE HAVE AN INTERMEDIATE APPELLATE COURT KNOWN AS THE 4TH CIRCUIT COURT OF APPEALS THAT SITS IN RICHMOND, VIRGINIA, THAT LOOKS OVER THE SHOULDER OF THIS

COURT, AND IT IS THE COURT TO WHICH A FIRST APPEAL FROM A CONVICTION OR A TRIAL IN THIS COURT WOULD GO.

AND THEN BEYOND THAT, WE HAVE THE UNITED STATES SUPREME COURT, WHICH IS THE HIGHEST COURT IN THE APPELLATE SYSTEM, AND THE HIGHEST COURT IN THE UNITED STATES.

* * *

[7-3] OF COURSE, THE COURT REPORTER TAKES DOWN EVERY WORD THAT I SAY, AND IF I SHOULD GIVE YOU A WRONG OR AN ERRONEOUS PRINCIPAL OF LAW, THERE'S A VERY FINE APPELLATE COURT THAT SITS ABOVE ME IN RICHMOND THAT WOULD CORRECT MY MISTAKE IN THIS CASE, AS IT HAS CORRECTED MY MISTAKES IN THE PAST. SO, DO NOT BE CONCERNED ABOUT ANY PRINCIPLE THAT I GIVE YOU AS TO WHETHER OR NOT IT STATES A CORRECT PRINCIPLE OF LAW.

* * *

[2-98] MR. JENDRON: PLEA NEGOTIATIONS AREN'T RELEVANT IN THIS MATTER, HE'S ENTERED INTO A PLEA AGREEMENT.

* * *

THE COURT: WELL, OF COURSE, LET ME JUST SAY THIS SO WE CAN GET THE RECORD STRAIGHT. THE UNITED STATES SUPREME COURT HAS APPROVED PLEA BARGAINING AS

A MEANS OF DISPOSING OF CASES IN THIS COURT, AND THE RULES OF THIS COURT SPECIFICALLY PROVIDE FOR IT SO LONG AS THE JUDGE DOES NOT PARTICIPATE. OF COURSE–

MR. HIRSCHHORN: I AGREE.

THE COURT: – ULTIMATELY, AS IN HIS CASE, I WAS THE JUDGE AND I APPROVED THE PLEA BARGAINING.

MR. HIRSCHHORN: YOUR HONOR, I HAVE A MATTER TO TAKE UP WITH THE COURT AT THE NEXT RECESS. I WASN'T SAYING PLEA BARGAINING WAS INAPPROPRIATE, I WAS JUST TRYING TO ESTABLISH HOW OFTEN HE BARGAINED AND WHAT HE HAD TO DO.

* * *

[1-157] THE COURT: WELL, I DON'T BUY THAT. I THINK ONE THING THAT I SHOULD CONSIDER IN PASSING ON THE ADMISSIBILITY OF IT IS WHAT I UNDERSTAND TO BE THE EVIDENCE IN THE CASE AGAINST YOUR CLIENT, AND I DON'T KNOW ALL OF IT, BUT I DO, I HEARD THE TESTIMONY OF MR. FILLINGHAM AND I KNOW THAT THERE'S VERY POWERFUL EVIDENCE, ASIDE FROM THESE CONVICTIONS, ABOUT THE GUILT OF YOUR CLIENT. THAT CAME OUT AT SOME MOTIONS THAT WE HAD AT A PRETRIAL CONFERENCE.

MR. HIRSCHHORN: IF SO, JUDGE, WHY SHOULD THE GOVERNMENT RISK PUTTING –

THE COURT: WELL, I DON'T THINK IT'S GOING TO BE PREJUDICIAL. I CITE THAT BECAUSE I DON'T THINK THAT THE PREJUDICIAL ASPECT OF IT OVERRIDES THE PROBATIVE VALUE OF IT, THAT'S ALL I'M SAYING.

I THINK I HAVE A DUTY TO LOOK AT THE OVERALL PICTURE IN DETERMINING WHETHER IT'S – SHOULD BE RULED OUT ON THE BASIS OF THE PREJUDICE OVERRIDING THE PROBATIVE VALUE OF IT.

MR. HIRSCHHORN: ARE WE APPLYING THE HARMLESS ERROR RULE EARLY?

[1-158] THE COURT: ARE WE DOING WHAT?

MR. HIRSCHHORN: ARE YOU APPLYING THE HARMLESS ERROR RULE EARLY, IS THAT WHAT THE COURT IS SAYING?

THE COURT: NO, I'M NOT SAYING THAT. I SAY, CITING WHAT I CONSIDER TO BE THE OVERWHELMING EVIDENCE OF THE GUILT OF YOUR CLIENT AS THE REASON WHY I WOULD CONCLUDE THAT IT'S – THAT THE PREJUDICE – PREJUDICIAL EFFECT OF THE EVIDENCE WOULD NOT OUTWEIGH THE PROBATIVE VALUE OF THE EVIDENCE, THAT'S ALL I'M SAYING.

MR. HIRSCHHORN: IN THAT CASE, YOUR HONOR, IF THAT IS YOUR RULING, I ASK THAT YOU GIVE A LIMITING INSTRUCTION TO THE JURY THAT THEY CAN CONSIDER THIS EVIDENCE

SOLELY AS IT GOES TO THE GOVERNMENT'S – TO THE REQUIREMENT THAT THE GOVERNMENT PROVE A CONTINUING SERIES OF VIOLATIONS AND NOT AS IT BEARS ON THE DEFENDANT'S CHARACTER.

* * *

[4-2] (JURY NOT PRESENT.)

THE COURT: COULD YOU BRING OUT THAT ONE JUROR, MS. NELMS?

THE MARSHAL: YES, SIR.

(JUROR ENTERS COURTROOM.)

THE COURT: GOOD MORNING, MS. NELMS.

MS. NELMS: GOOD MORNING.

THE COURT: I HAVE HERE A DOCTOR'S CERTIFICATE FROM DR. KANITKAR, IT SAYS:

"TO WHOM IT MAY CONCERN: CAROLYN MOAK NELMS IS CURRENTLY UNDER MY MEDICAL CARE AND WILL BE UNABLE TO PERFORM HER JURY DUTIES UNTIL FURTHER NOTICE."

THIS IS THE FIRST NOTIFICATION I HAD THAT YOU WERE HAVING PROBLEMS. YOU DO NOT FEEL THAT YOU CAN CONTINUE WITH YOUR JURY SERVICE?

MS. NELMS: NO, SIR. WOULD YOU LIKE FOR ME TO EXPLAIN IT TO YOU?

MR. HIRSCHHORN: I'M SORRY, YOUR HONOR, I CAN'T HEAR THE–

THE COURT: WELL, I DON'T KNOW THAT IT'S NECESSARY FOR YOU TO HEAR THIS.

WHAT DID YOU WANT TO SAY?

MS. NELMS: I SAID, DO YOU WANT ME TO EXPLAIN IT TO YOU?

THE COURT: NO, I DON'T NEED FOR YOU TO GO INTO [4-3] ANY DETAIL, I DON'T WANT TO EMBARRASS YOU IN ANY WAY. BUT IF YOU TELL ME, IN VIEW OF THIS DOCTOR'S CERTIFICATE, THAT YOU ARE UNABLE TO CONTINUE PHYSICALLY WITH YOUR JURY SERVICE, I WILL EXCUSE YOU.

MS. NELMS: ALL RIGHT.

MR. HIRSCHHORN: YOUR HONOR, MAY WE BE HEARD AT THE BENCH?

THE COURT: WHAT'S THAT?

MR. HIRSCHHORN: MAY WE BE HEARD AT THE BENCH?

THE COURT: GO AHEAD.

MR. HIRSCHHORN: WELL, I WOULD LIKE TO MAKE A MOTION ON THE RECORD BUT NOT IN THE PRESENCE OF THE JUROR, IF POSSIBLE. I COULDN'T HEAR WHAT THE JUROR SAID, I COULDN'T HEAR—

THE COURT: SHE TOLD ME THAT SHE WAS NOT ABLE PHYSICALLY TO CONTINUE WITH THE JURY SERVICE. I HAVE A DOCTOR'S CERTIFICATE HERE WHICH SHE GAVE TO THE CLERK THIS MORNING.

NOW, DO YOU WANT TO SEE THE CERTIFICATE? I READ IT.

MR. HIRSCHHORN: YOUR HONOR, I WOULD LIKE THE OPPORTUNITY TO BE HEARD AT THE BENCH OUTSIDE THE JUROR'S PRESENCE. IT'S EMBARRASSING TO ME, IT'S EMBARRASSING TO MY CLIENT.

THE COURT: ALL RIGHT. WOULD YOU STEP BACK IN THE JURY ROOM, PLEASE.

[4-4] (JUROR EXITS COURTROOM.)

THE COURT: THIS IS EXACTLY THE REASON WE HAVE THREE ALTERNATES, IF SOMEBODY GETS SICK AND CAN'T CONTINUE.

MR. HIRSCHHORN: I UNDERSTAND THAT, JUDGE, BUT I ASKED YOU IF I COULD HEAR WHAT THE JUROR WAS SAYING AND YOU SAID I COULDN'T, IT WAS NONE OF MY BUSINESS. WELL, THIS IS —

THE COURT: NO, I DIDN'T SAY IT WASN'T YOUR BUSINESS, I SAID IT WAS NOT NECESSARY FOR YOU TO HEAR IT. I WAS NOT GOING TO ASK HER TO TELL ME WHAT HER PROBLEM WAS. SHE WAS A LITTLE HESITANT ABOUT IT, I'VE GOT A DOCTOR'S CERTIFICATE, NOW IF YOU WANT TO ASK HER WHAT HER PROBLEMS ARE, I'LL BRING HER BACK AND LET YOU ASK HER.

MR. HIRSCHHORN: I THINK WE SHOULD HAVE KNOWN THERE WAS A CONDITION PRIOR THAT WOULD INTERFERE WITH HER ABILITY TO SIT, BECAUSE SHE MIGHT HAVE BEEN EXCUSED FOR CAUSE. I RAN OUT OF CHALLENGES ON THE ALTERNATES, YOUR HONOR, AND SHE WAS NOT A JUROR OF MY CHOICE.

THE COURT: SHE'S NOT AN ALTERNATE.

MR. HIRSCHHORN: I KNOW THAT.

THE COURT: BUT THE POINT IS, THIS CERTIFICATE IS DATED THE 25TH, IT'S DATED THIS MORNING.

MR. HIRSCHHORN: I KNOW SHE'S NOT AN ALTERNATE, JUDGE, AND THAT'S THE VERY POINT, I RAN OUT OF CHALLENGES—

THE COURT: WELL, JUST TELL ME WHAT YOU WANT TO DO.

[4-5] MR. HIRSCHHORN: I WOULD LIKE TO KNOW FIRST WHEN THIS CONDITION, WHATEVER

IT IS, OCCURRED, IF IT WAS PRIOR TO JURY SELECTION, AND FRANKLY, JUDGE, I DON'T THINK, CONSIDERING THE STAGE IN THIS CASE, IT'S ASKING TOO MUCH FOR HER TO TELL US, THE DOCTOR DOESN'T TELL US WHAT HER CONDITION IS. I MEAN, I—

THE COURT: ALL RIGHT, BRING HER BACK OUT, WOULD YOU PLEASE?

THE MARSHAL: YES, SIR.

(JUROR ENTERS COURTROOM.)

THE COURT: YOUNG LADY, WOULD IT BE EMBARRASSING FOR YOU TO TELL US WHAT YOUR PROBLEMS ARE?

MS. NELMS: I'M HAVING SOME MARITAL PROBLEMS AND I DON'T THINK IT WOULD BE FAIR TO THE CLIENT—FOR THE DEFENDANT FOR ME TO CONTINUE.

THE COURT: YOU'RE HAVING MARITAL PROBLEMS?

MS. NELMS: YES, SIR.

THE COURT: IS THAT SOMETHING THAT JUST DEVELOPED?

MS. NELMS: IT'S JUST THE LAST COUPLE OF DAYS IT'S BEEN PROBLEMS.

THE COURT: SINCE YOU WERE SELECTED ON THIS JURY?

MS. NELMS: WELL, WE HAVE BEEN HAVING PROBLEMS BUT IT'S JUST A COUPLE OF PROBLEMS IN THE LAST COUPLE OF DAYS THAT I DON'T THINK—

THE COURT: WHERE DO YOU LIVE?

[4-6] MS. NELMS: IN COLUMBIA.

THE COURT: AND THESE ARE PROBLEMS THAT HAVE GOTTEN WORSE SINCE YOU'VE BEEN SITTING ON THIS JURY?

MS. NELMS: YES, SIR, AND I DON'T THINK IT'S FAIR—

THE COURT: ARE YOU IN SUCH A MENTAL STATE THAT YOU DON'T FEEL YOU ARE IN POSITION TO CONTINUE WITH THIS CASE?

MS. NELMS: I DON'T—YOU KNOW, THINKING OF OTHER THINGS, IT WOULD INTERFERE WITH MY JUDGMENT AND I DON'T THINK THAT'S FAIR.

THE COURT: YOU CAN'T KEEP YOUR MIND ON WHAT'S GOING ON HERE, IS THAT WHAT YOU ARE TELLING ME?

MS. NELMS: WELL, NO, SIR, NOT COMPLETELY, AND I DON'T THINK IT WOULD BE FAIR TO ANYONE.

THE COURT: YOU DON'T THINK IT WOULD BE FAIR FOR YOU TO CONTINUE TO SERVE?

MS. NELMS: NO, SIR.

THE COURT: DO YOU FEEL THAT YOU ARE IN SUCH AN EMOTIONAL STATE THAT YOU SHOULD NOT CONTINUE SERVING, IS THAT WHAT YOU ARE TELLING ME?

MS. NELMS: YES, SIR.

THE COURT: DO YOU WANT TO ASK HER ANY QUESTIONS?

MR. HIRSCHHORN: NO, SIR.

THE COURT: ALL RIGHT. YOU MAY GO BACK.

(JUROR EXITS COURTROOM.)

MR. HIRSCHHORN: AFTER THE WAY THE COURT PHRASED [4-7] THE QUESTIONS, THERE ARE NO QUESTIONS I COULD ASK. I OBJECT TO THE JUROR BEING EXCUSED. I HEARD WHAT SHE SAID AND I DON'T KNOW OF ANYONE WHO DOESN'T GO THROUGH LIFE WITHOUT MARITAL PROBLEMS.

THE COURT: WELL, I WOULDN'T EXPECT YOU TO AGREE TO MUCH OF ANYTHING HERE, MR. HIRSCHHORN

MR. HIRSCHHORN: I'M SORRY, JUDGE?

THE COURT: I SAID I WOULDN'T EXPECT YOU TO AGREE WITH MUCH OF ANYTHING.

MR. HIRSCHHORN: WELL, I DISAGREE WITH THAT STATEMENT, JUDGE.

THE COURT: WELL, YOU CAN DISAGREE WITH IT, I'M JUST SPEAKING FROM MY OBSERVATIONS.

MR. HIRSCHHORN: I'VE GOT AN OBLIGATION TO PROTECT MY CLIENT—

THE COURT: I UNDERSTAND THAT.

MR. HIRSCHHORN:—AND THE RECORD IN THIS CASE.

THE COURT: I'M NOT GOING TO FORCE THIS YOUNG LADY WHEN SHE COMES UP HERE AND TELLS ME THAT SHE IS SO EMOTIONALLY UPSET THAT SHE CAN'T CONTINUE WITH THIS CASE AND SHE CAN'T GIVE HER ATTENTION TO IT, AND SHE HAS A DOCTOR'S CERTIFICATE THAT SAYS SHE'S UNDER HIS CARE. SO I'M GOING TO SUBSTITUTE, OF COURSE OVER YOUR OBJECTION, I DON'T—DO YOU GENTLEMEN OBJECT?

MR. JENDRON: NO, YOUR HONOR.

[4-8] THE COURT: OVER THE OBJECTION OF DEFENSE COUNSEL, I'M GOING TO SUBSTITUTE THE FIRST ALTERNATE, WHOEVER SHE MAY BE.

MR. HIRSCHHORN: COULD I ASK THE COURT TO MAKE THAT—TO MAKE THAT DOCTOR'S NOTE A PART OF THE RECORD?

THE COURT: IT'S GOING TO BE A PART OF THE RECORD, IT IS NOW. AND OF COURSE HER QUESTIONING AND ANSWERING, HER STATEMENT TO THE COURT, IS PART OF THE RECORD.

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[7-67] THE COURT: I CHARGED THAT, AND FRANKLY, I DID IT WITH TONGUE-IN-CHEEK, BECAUSE YOU REQUESTED IT, BECAUSE YOU SAID SOMETHING TO THE EFFECT THAT BECAUSE THE WITNESSES ON ONE SIDE MAY OUTNUMBER THE WITNESSES ON THE OTHER, THAT THAT'S NOT MATERIAL, OR SOMETHING TO THAT EFFECT. BUT I JUST DIDN'T LIKE THE CHARGE, BUT YOU HAD REQUESTED IT, YOU HAD REVISED YOUR REQUEST AND THAT WAS IN YOUR REVISED REQUEST.

MR. HIRSCHHORN: YES, SIR.

THE COURT: IT'S OBVIOUS THAT THERE WERE NO WITNESSES ON THE PART OF THE DEFENDANT AND I REALLY DIDN'T WANT TO GET INTO THAT BUT I—

MR. HIRSCHHORN: I REALIZE YOU ARE RIGHT, THE LAST SENTENCE SHOULD NOT HAVE BEEN GIVEN BUT—

THE COURT: I ACCEPTED YOUR REQUEST ON THAT.

MR. HIRSCHHORN: YOU'RE RIGHT, AND IT WENT IN WITH THAT LAST SENTENCE IN AND SHOULD NOT HAVE, AND THAT'S A TRIAL ERROR ON MY PART.

THE COURT: WELL, YOU ARE NOW REQUESTING SOMETHING [7-68] ON TWO OCCASIONS AND WHEN I GIVE IT, YOU WANT TO EXCEPT TO IT. I DON'T THINK THAT'S EXACTLY FAIR.

MR. HIRSCHHORN: I AGREE IT DOESN'T SEEM TO BE FAIR. I'M NOT PERFECT AND I MISSED THAT ONE.

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[7-10] THE WEIGHT OF THE EVIDENCE IS NOT NECESSARILY DETERMINED BY COUNTING THE NUMBER OF WITNESSES TESTIFYING ON EITHER SIDE. YOU SHOULD CONSIDER ALL THE FACTS AND CIRCUMSTANCES IN EVIDENCE TO DETERMINE WHICH WITNESSES ARE WORTHY [7-11] OF CREDENCE AND BELIEF. YOU MAY FIND THAT THE TESTIMONY OF A SMALLER NUMBER OF WITNESSES ON ONE SIDE IS MORE CREDIBLE THAN THE TESTIMONY OF A GREATER NUMBER OF WITNESSES ON THE OTHER SIDE.

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[6-181] NOW I MENTIONED TO YOU ON MORE THAN ONE OCCASION, AND I JUST MENTION IT NOW FOR EMPHASIS, YOU MUST REMEMBER THAT THESE ATTORNEYS ARE ADVOCATES, THEY'RE PARTISANS, THEY'RE TRYING TO CONVINCE YOU THAT THEIR SIDE OF THE CASE SHOULD PREVAIL. BUT UNDER YOUR OATH AND UNDER MY OATH, WE'RE NOT [6-182] PERMITTED TO BE PARTISAN IN ANY MANNER. WE SPENT A GREAT DEAL OF TIME SELECTING YOU AS A DISINTERESTED, FAIR-MINDED, UNBIASED, UNPREJUDICED JURY, AND I'M AS CONFIDENT AS I'VE EVER BEEN OF ANYTHING THAT THIS JURY WILL ARRIVE AT A FAIR AND A JUST VERDICT, A VERDICT THAT DOES JUSTICE TO THE PARTIES HERE.

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